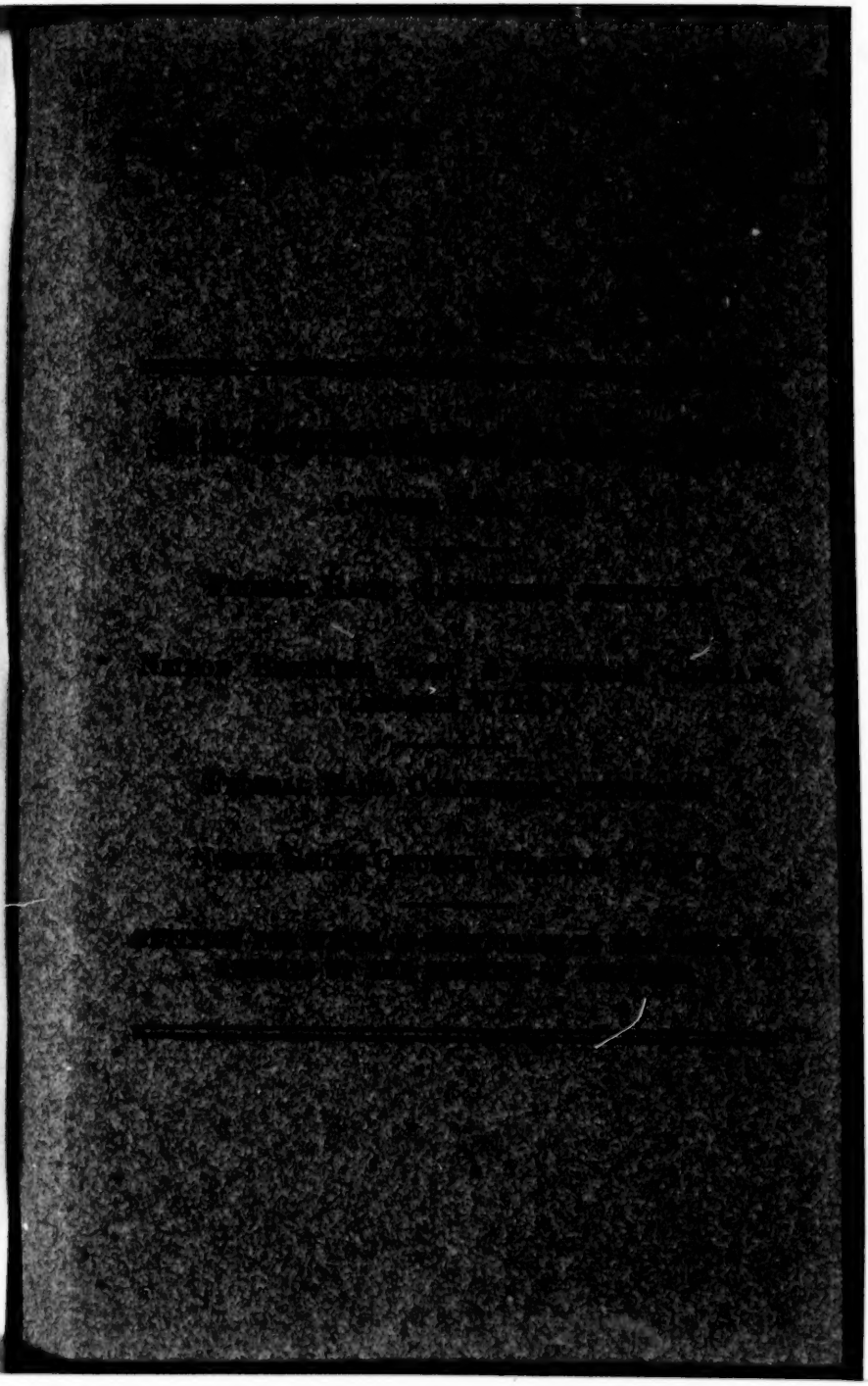

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CITATIONS

Statute:	
Radio Act of 1927, as amended (c. 169, 44 Stat. 1166, as amended March 28, 1928, c. 263, 45 Stat. 373; 47 U. S. C. Sec. 89; and as amended July 1, 1930, c. 788, 46 Stat. 844; U. S. C., Sup. VI, Title 47, Sec. 96 (a) (1), (d)):	
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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. —

FEDERAL RADIO COMMISSION, PETITIONER

v.

NELSON BROTHERS BOND & MORTGAGE COMPANY (Station WIBO)

No. —

FEDERAL RADIO COMMISSION, PETITIONER

v.

NORTH SHORE CHURCH (STATION WPCC)

PETITION FOR WRITS OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

The Solicitor General, on behalf of the Federal Radio Commission, prays that writs of certiorari issue to review the decree of the Court of Appeals of the District of Columbia entered in the causes between the above-named parties on December 5, 1932, which reversed an order of the Federal Radio Commission refusing to renew the respondents' broadcasting licenses and granting the application of a third station for the use of the frequency now assigned to the respondents.

OPINIONS BELOW

The opinions of the Court of Appeals (R. 1138–1147) are not reported.

JURISDICTION

The decree of the Court of Appeals in each cause was entered December 5, 1932. (R. 1148.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 16 of the Radio Act of 1927, as amended by the Act of July 1, 1930, c. 788, 46 Stat. 844.[1]

QUESTION PRESENTED

Whether under the Act of March 28, 1928, the Federal Radio Commission, in exercising its licensing power, is authorized to decline to renew a license to use a frequency previously used by two stations rendering satisfactory service in a grossly overquota State, and, upon a finding that the public interest would be served thereby, to license the use of this frequency to a meritorious station in an underquota State, for the purpose of extending and improving the service of the latter station and bringing about a greater degree of equality in the broadcasting facilities licensed in the two States.

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[1] A petition on behalf of the Johnson-Kennedy Radio Corporation, intervenor below, is being filed simultaneously with this petition. An order of severance as to Strawbridge & Clothier, the other intervenor, has been obtained and filed as a part of the record in this case.

STATUTE INVOLVED

The pertinent provisions of the Radio Act of 1927 (c. 169, 44 Stat. 1162), as amended by the Act of March 28, 1928 (c. 263, 45 Stat. 373), known as the Davis Amendment, and as further amended by the Act of July 1, 1930 (c. 788, 46 Stat. 844), are set forth in the Appendix, *infra,* pp. 18–21.

STATEMENT

The respondents are Chicago broadcasting stations sharing time, under licenses from the Federal Radio Commission, on the frequency of 560 kc. They filed separate appeals (R. 1–6, 17–24) in the Court of Appeals of the District of Columbia from an order of the Federal Radio Commission (R. 1130–1131) which directed the secretary of the Commission to issue to the Johnson-Kennedy Radio Corporation (hereinafter called the applicant) of Gary, Indiana, a license to operate with unlimited hours on the frequency of 560 kc. and to terminate respondents' existing licenses. The Johnson-Kennedy Radio Corporation intervened in both appeals. (R. 9–12, 26–29.) The court disposed of both appeals in one opinion (R. 1138) and entered a decree setting aside the Commission's order (R. 1148).

On September 26, 1930, the Johnson-Kennedy Radio Corporation, operating Station WJKS at Gary, Indiana, upon the frequency of 1,360 kc., and sharing time (in the ratio of four-sevenths to three-

sevenths) with Station WGES of Chicago (R. 1125), filed its application for modification of its station license so as to permit it to operate full time upon any frequency in the 560–610 kc. band (R. 35–38). The application was subsequently amended by telegram asking that the applicant be assigned to the 560 kc. frequency and stating that if the provisions of the Commission's General Order 102[2] would require the removal of a station or stations located in an overquota State of the Fourth Zone, using the facilities requested, the applicant requested that Stations WIBO and WPCC (the respondents) of Chicago should be removed. The Commission, after examination of this application, stated that it was not satisfied that the public interest, convenience, or necessity would

[2] The Commission's General Order 102 (R. 1072–1075) provides that "applications from under-quota states in zones which have already allocated to them their pro rata share of radio facilities should be for a facility already in use in that zone by an over-quota state."

General Order 92 (R. 1069–1072) established a system for determining the unit values of broadcasting facilities, by classifying stations according to their powers, times of operation, etc. It also provided that, in conformity with the Davis Amendment of March 28, 1928, c. 263, 45 Stat. 373, each of the five zones created by the Radio Act should have broadcasting stations the total volume in units of which should be equal, and further, that within each such zone facilities should be fairly and equitably distributed among the states in proportion to the population each of such states bears to the population of the zone. The zones referred to were created by Section 2 of the Radio Act of 1927, c. 169, 44 Stat. 1162, the States of Indiana and Illinois being included in the Fourth Zone.

be served by granting it, and, accordingly, designated it for hearing on April 23, 1931, the respondents below, together with other interested parties, being duly notified of this action. (R. 43–46.) Pursuant to this notice, a hearing was held April 23 to April 30, 1931, before an examiner of the Commission (R. 1125), who filed a report recommending that the application should be denied (R. 1082–1094). Exceptions were filed to this report by the applicant. (R. 1095–1123.) On October 16, 1931, the Commission entered its order granting the application and directed the termination of the licenses of the Chicago stations. (R. 1130–1131.)

The Commission issued with its order a statement of the facts and of the grounds for its decision (R. 1125–1130), which may be summarized as follows:

The applicant is an Indiana corporation engaged solely in the ownership and operation of Station WJKS, Gary, Indiana, which station represents an investment of approximately $75,000. (R. 1125.) Gary, Indiana, which is about 30 miles from Chicago, is the largest steel center in the world and has a population of approximately 110,000. (R. 1125.) Gary is located in the Calumet region, which has a population of about 800,000, 60% of which is foreign born, representing over 50 nationalities. (R. 1125.) Approximately 90% of the inhabitants of the region depend upon the steel industry for employment and livelihood. (R. 1125.)

The applicant's station is the only radio station in Gary, and its programs are designed to meet the needs of this large foreign population. (R. 1126.) It features broadcasting programs for Hungarian, Italian, Mexican, Spanish, German, Russian, Polish, Croatian, Lithuanian, Scotch, and Irish people. (R. 1126.) At least an hour daily is devoted to these programs, which are musical, educational, and instructive in nature. (R. 1126.) Their purpose is to stimulate community and racial pride and to instruct in the duties and ideals of American citizenship. (R. 1127.) No compensation is received by the station for the time devoted to these broadcasts. (R. 1127.) If the application should be granted, the applicant proposed to devote more time to this type of service. (R. 1127.)

Time is also devoted by the station to safety prevention talks for workmen; a children's hour is maintained for the use of students of the various schools; good citizenship talks are broadcast weekly by judges and other civic leaders; the local police department is privileged to use the station at any time, and there is an outstanding invitation to every fraternal, charitable, and religious organization in the Calumet region to use the facilities of the station, without cost, such use often being made. (R. 1127.) The Sunday programs consist mainly of church service broadcasts, all churches and denominations being permitted to participate. (R. 1127.) The station has no chain affiliations. (R. 1127.)

The weekly cost of talent is about $300 and the weekly experses for help average $700. (R. 1127.) The station employs from 15 to 25 persons in its operation, and the total cost of operation is approximately $35,000 per year. The applicant has in its treasury the sum of $10,000. Its revenue is obtained from the sale of spot announcements. (R. 1127.)

The applicant, WJKS, is the only station located in the Calumet region which serves a substantial portion of the area with excellent or even good service, although the area is served by Station WOWO of Fort Wayne and by several Chicago stations. The transmitter of WJKS is a composite transmitter capable of 100% modulation, and its equipment is in good mechanical and electrical condition. (R. 1127.) Although WJKS delivers a signal of sufficient strength to give good reception in its normal service area, if not interfered with, heterodyne and cross-talk interference exists to within 3 miles of the transmitter and constant objectionable interference is found in the good service area of the station, particularly to the south, southeast, and east. (R. 1127–1128.) During the last two years the amount of interference experienced by the applicant in this area has increased, complaints of such interference having been constantly received by it. (R. 1128.) On the 1,360 kc. frequency there were two stations, located at Syracuse, New York, and Charleston, South Carolina, which

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were separated from Gary by less than the geographical separation necessary to prevent objectionable interference. (R. 1128.) Station WIBO, which is now operating on the frequency requested by the applicant (560 kc.), about 30 miles from Gary, is heard clearly in the city without any interference. (R. 1128.) The Commission found that the operation of the applicant on the frequency of 560 kc. and the deletion of the Chicago stations, WIBO and WPCC, would not be expected to increase interference with the services of any other stations. (R. 1128.)

With respect to the comparative broadcasting facilities, the State of Indiana was 2.08 units, or 22%, under its quota in station assignments, and Illinois was 12.49 units, or 55%, over quota in such assignments. (R. 1129.) The Fourth Zone, in which both stations are located, is 21 units, or 26%, over quota. (R. 1129.) The granting of the application and the deletion of Stations WIBO and WPCC, the Commission found, would reduce the overquota status of Illinois by .88 unit and would increase the quota of Indiana .43 unit. (R. 1129.)

Station WIBO was owned by Nelson Bros. Bond & Mortgage Company and operated separately from its mortgage and real estate business. (R. 1128.) It employs 55 persons in the operation of the station, the total monthly expenses of which

average $17,000. (R. 1128.) The station represents a total cost of $346,362, less a reserve for depreciation of $54,627. (R. 1128.) It has been operating since April, 1925. (R. 1128.) Station WIBO is licensed to share time with Station WPCC, which is owned and operated by the North Shore Church, an incorporated organization. Station WPCC is authorized to operate on Sundays from 10 a. m. to 4:30 p. m. and from 6 p. m. to 11:30 p. m., WIBO being authorized to operate the remaining time. (R. 1128.) By agreement with Nelson Bros. Bond & Mortgage Company, Station WPCC is permitted to broadcast over WIBO on certain week-day hours, in exchange for certain Sunday hours licensed to WPCC. (R. 1128.) The programs broadcast by WIBO are almost entirely commercial in their nature, and include a large number of chain programs originating in the National Broadcasting network. (R. 1129.) The same general type of programs broadcast by WIBO, including the chain programs, is received in the service area of WIBO from many other stations located in the Chicago district. (R. 1129.)

Station WPCC broadcasts approximately 8 hours a week, the programs being made up entirely of sermons, religious music, and talks relating to the work and interests of the North Shore Church. (R. 1129.) Contributions are solicited over the

station for the use of the church and the advancement of those matters in which it is interested. (R. 1129.) The station is not used by other denominations, religious or charitable societies. (R. 1129.) The Commission found that other stations in Chicago, including WMBI, owned and operated by the Moody Bible Institute, which devote more time to programs of a religious nature than WPCC, are received in the service area of that station. (R. 1129.)

The Commission, concluding that the application of Johnson-Kennedy Radio Corporation should be granted, stated as grounds for its decision (R. 1130):

(1) The applicant station (WJKS) now renders an excellent public service in the Calumet region, and the granting of this application would enable that station to further extend and enlarge upon that service. (2) The deletion of Stations WIBO and WPCC would not deprive the persons within the service areas of those stations of any type of programs not now received from other stations. (3) Objectionable interference is now experienced within the service area of WJKS through the operation of other stations on the same and adjacent frequencies. (4) The granting of the application and the deletion of Stations WIBO and WPCC would not increase interference within the good

service areas of any other stations. (5) The granting of the application and deletion of Stations WIBO and WPCC would work a more equitable distribution of broadcasting facilities within the Fourth Zone, in that there would be an increase in the radio broadcasting facilities of Indiana which is now assigned less than its share of such facilities and a decrease in the radio broadcasting facilities of Illinois which is now assigned more than its share of such facilities; and (6) that the public interest, convenience, and/or necessity would be served thereby.

The court below reversed the order of the Commission upon the broad ground that the Davis Amendment (*infra,* p. 18–19) was not intended to authorize or to require the Commission to equalize "the comparative broadcasting facilities of the various States or zones by unnecessarily injuring stations already established which are rendering valuable services to their natural service areas." (R. 1141.) It pointed out that the language of the Davis Amendment, relating to the allocation of facilities among the States in each zone (*infra,* p. 18), directed the licensing authority to make "a fair and equitable" allocation of licenses, according to population, and expressed the view that this provision did not mean that the Commission should attempt to equalize facilities among the States if the effect would be to delete established stations

rendering good service. (R. 1141.) Without specifically disturbing the Commission's findings, the court concluded as a matter of law that the Commission's action was improper, stating (R. 1141):

> The only apparent reason for granting the application of Station WJKS and destroying the other two stations is that Indiana is underquota, which in the circumstances furnishes no substantial justification for the decision of the commission. As already observed, the evidence discloses that Stations WIBO and WPCC have been and are "serving public interest, convenience, and necessity" certainly to as great an extent as the applicant station. In our view, the conclusively established and admitted facts furnish no legal basis for the decision of the commission. In other words, the decision is in a legal sense arbitrary and capricious.

In support of its general conclusion, the court incidentally referred to certain facts not made the basis of findings by the Commission. It stated that the Chicago stations, WIBO and WPCC, were meritorious stations, serving the public interest, convenience, and necessity; that they provided radio service for people within the service area of the applicant; that both were broadcasting prior to the time the applicant entered the field; that

in the Commission's reallocation of 1928, following the enactment of the Davis Amendment, all three stations had been assigned to their present frequencies, and that there was no evidence showing that there had been any material change in conditions since that time.

The court also referred with apparent approval (R. 1138) to certain findings of the examiner, whose recommendation that the application should be denied was not adopted by the Commission. The court quoted his finding that although the applicant was rendering a commendable public service on its part-time assignment, its service would be improved by the installation of the most modern radio equipment and operation in the most efficient manner on its present frequency.[3] The court also referred to a finding of the examiner that more objectionable interference would possibly result

[3] This finding of the examiner was inconsistent with the following findings (R. 1127–1128) of the Commission (the record references are to the evidence supporting the Commission's findings): (1) The transmitter of WJKS is a composite transmitter capable of 100 per cent modulation (R. 134, 179), and the equipment is in good mechanical and electrical condition (R. 134). (2) Although WJKS delivers a signal of sufficient strength to give good reception in its normal service area if not interfered with (R. 162, 314), heterodyne and cross-talk interference exists to within three miles of the transmitter and constant objectionable interference is found in the good-service area of the station, particularly to the south, southeast, and east (R. 67–68, 71, 134, 159, 219).

from the operation of the applicant, WJKS, on the 560–kc. channel than that now resulting from its operation on the frequency of 1,360 kc.[4]

Justices Groner and Hitz dissented from the opinion of the majority of the Court of Appeals, stating that in their view the action taken by the Commission was authorized and required by the provisions of the Davis Amendment. (R. 1142.) They also questioned the propriety of the majority's reliance on the findings of the examiner which were not consistent with the findings of the Commission. (R. 1145.)

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred—

1. In holding that the Federal Radio Commission does not have the authority, under the Act of March 28, 1928, c. 263, 45 Stat. 373, in the exercise of its licensing power to lessen the gross disparity existing between the broadcasting facilities of two States by granting a license to use the frequency assigned to the respondents, located in the over-quota State, to an applicant for such frequency

[4] This finding was inconsistent with the following findings of the Commission: (1) Station WIBO, now operating on the frequency requested by this applicant (560 kc.), about 30 miles from Gary, is clearly heard in the city without interference of any nature. (R. 68, 95, 163.) (2) The operation of WJKS on 560 kc. and the deletion of Stations WIBO and WPCC would not be expected to increase interference with the services of any other station. (R. 117, 123.)

in the underquota State and declining to grant the license to respondent.

2. In holding that the action of the Commission was an arbitrary and capricious exercise of power.

3. In relying upon a finding of the examiner that the service of the applicant station would be improved by the installation of the most modern radio equipment and its operation in the most efficient manner on its present frequency, which finding was inconsistent with findings of the Commission, supported by substantial evidence.

4. In relying upon a finding of the examiner that more objectionable interference would result from the operation of the applicant station on the 560 kc. frequency than now results from its operation on the 1,360 kc. channel, which finding was inconsistent with findings of the Commission, supported by substantial evidence.

5. In holding that the Federal Radio Commission erroneously determined that the public interest, convenience, or necessity would be served by the transfer to the applicant of the frequency assigned to the respondents.

6. In reversing the order of the Commission.

REASONS FOR GRANTING THE WRITS

1. The case presents a question of public importance which should be decided by this Court. It involves the construction of the Act of March 28, 1928, known as the Davis Amendment (c. 263, 45

Stat. 373), which pertains to the manner in which broadcasting facilities shall be allocated to the States. It is the first case in the courts involving the affirmative application of that Act by the Commission.

2. It is essential to the proper discharge of the Commission's duties that this Court should determine whether the Commission may refuse to renew licenses and thereby curtail the facilities of existing stations, in order to bring about a fair distribution of broadcasting facilities among the States, as provided in the Davis Amendment. Substantially the same question is involved in 116 separate proceedings pending before the Federal Radio Commission, in which applications have been filed requesting, in each case, the reassignment to an underserved State or zone of all or a substantial part of the facilities now licensed to a station in an overquota State or zone.[5]

3. It is believed that the lower court placed an erroneous construction upon the language of the Davis Amendment, requiring the Commission to

[5] This statement is based upon an analysis made by the Commission of its docket of pending cases, as of January 3, 1933, which shows that of these 116 applications, 47 have not yet been considered by the Commission; 34 have been considered and designated for hearing; 5 have been heard by examiners but not reported; and 30 have been heard by examiners, reported, and are pending decision by the Commission. There are also three such cases which have been decided by the Commission and appealed to the Court of Appeals.

make a fair and equitable allocation of broadcasting facilities to each of the States, according to population. Although the Commission may not be required to make an exact mathematical distribution of facilities to each of the States, it seems clear that if the Davis Amendment is to have any application it must apply in a case such as this, where the State of Illinois is 55% overquota in station assignments while the State of Indiana is 22% underquota.

Wherefore, it is respectfully submitted that the writs of certiorari should be granted.

THOMAS D. THACHER,
Solicitor General.

JANUARY, 1933.

APPENDIX

The Radio Act of 1927 provides, in part, as follows:

> SEC. 9. The licensing authority, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.
>
> It is hereby declared that the people of all the zones established by section 2 of this Act are entitled to equality of radio broadcasting service, both of transmission and of reception, and in order to provide said equality the licensing authority shall as nearly as possible make and maintain an equal allocation of broadcasting licenses, of bands of frequency or wave lengths, of periods of time for operation, and of station power, to each of said zones when and in so far as there are applications therefor; and shall make a fair and equitable allocation of licenses, wave lengths, time for operation, and station power to each of the States, the District of Columbia, the Territories and possessions of the United States within each zone, according to population. The licensing authority shall carry into effect the equality of broadcasting service hereinbefore directed, whenever necessary or proper, by granting or refusing licenses or renewals of licenses, by changing periods of time for operation, and by increasing or decreasing station power, when applications are made for licenses or renewals of licenses: *Provided*, That if and when there is a lack of applications from

any zone for the proportionate share of licenses, wave lengths, time of operation, or station power to which such zone is entitled, the licensing authority may issue licenses for the balance of the proportion not applied for from any zone, to applicants from other zones for a temporary period of ninety days each, and shall specifically designate that said apportionment is only for said temporary period. Allocations shall be charged to the State, District, Territory, or possession wherein the studio of the station is located and not where the transmitter is located.

No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses and not to exceed five years in the case of other licenses.

No renewal of an existing station license shall be granted more than thirty days prior to the expiration of the original license. (C. 169, 44 Stat. 1166, as amended March 28, 1928, c. 263, 45 Stat. 373; U. S. C. Sup. VI, Title 47, Sec. 89.)

SEC. 11. If upon examination of any application for a station license or for the renewal or modification of a station license the licensing authority shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modifica-

tion thereof in accordance with said finding. In the event the licensing authority upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe. (C. 169, 44 Stat. 1167; U. S. C. Sup. VI, Title 47, Sec. 91.)

* * * * *

SEC. 16. (a) An appeal may be taken, in the manner hereinafter provided, from decisions of the commission to the Court of Appeals of the District of Columbia in any of the following cases:

(1) By any applicant for a station license, or for renewal of an existing station license, or for modification of an existing station license, whose application is refused by the commission.

* * * * *

(d) At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the commission, and, in event the court shall render a decision and enter an order reversing the decision of the commission, it shall remand the case to the commission to carry out the judgment of the court: *Provided, however,* That the review by the court shall be limited to questions of law and that findings of fact by the commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the commission are arbitrary or ca-

pricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 347 of Title 28 of the Judicial Code by appellant, by the commission, or by any interested party intervening in the appeal. (C. 169, 44 Stat. 1169, as amended July 1, 1930, c. 788, 46 Stat. 844; U. S. C. Sup. VI, Title 47, Sec. 96 (a) (1), (d).)

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